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PERFORMANCE OF A PRE-EXISTING CONTRACT AS CONSIDERATION.—*Donnelly* v. *Newbold* (Court of Appeals of Maryland, Oct. Term, 1901). Assumpsit. The appellee, Newbold, in writing guaranteed to appellants payment for a lot of bricks which appellants had contracted or were about to contract to sell to one Smith, a lessee of appellee. Court below held that the guaranty was collateral, and as Newbold had not been notified of acceptance of his offer he was not liable. *Davis* v. *Richards,* 115 U. S. 524, 1885; *Bishop* v. *Eaton,* 161 Mass 498, 1894.

The Court of Appeals found that the wording of the guaranty itself was equivocal, and remanded the case to have ascertained by the jury as a matter of fact whether it was collateral or original. The interesting point of the case is the question of consideration for Newbold's promise. The court held, "In either event the guaranty would rest upon a sufficient consideration, for in the first case it would have formed the inducement which led the appellants to make the sale, and even in the

second case the fact which appears on the face of the guaranty that the appellee was interested in the land which was to be improved by the use of the bricks constituted a consideration sufficient to support the guaranty."

The second alternative expresses a doctrine contrary to the majority of American decisions. In this country it has generally been held that the performance of a pre-existing contract duty with another party is no consideration for a promise. *Arend* v. *Smith,* 151 N. Y. 502, 1897; *Robinson* v. *Jewett,* 116 N. Y. 40, 1889; *Merrick* v. *Giddings,* 1 Mackey, D. C. 394, 1882; *Havana* v. *Ashurst,* 148 Ill. 115, 1894; *Wimer* v. *Worth Township,* 104 Pa. 317, 1883.

The opposite rule is held in England, in the leading cases of *Shadwell* v. *Shadwell,* 30 L. J. R., C. P. 145, 1861, and *Scotson* v. *Pegg,* 6 H. & N. 295, 1861. These cases proceed on the ground that by doing the act at request of the promisor the promisee has waived the right which he previously had in conjunction with his original fellow-contractor to rescind the contract, and therefore has given consideration to the promisor, who, of course, derived a benefit from the performance of the contract.

This English doctrine is upheld in a Massachusetts case, *Abbot* v. *Doane,* 163 Mass. 433, 1895, where it is plainly stated that if A. has contracted with B., and C., who is interested in the undertaking, offers to pay A. if he perform it, and A. does so, the performance by A. is sufficient consideration for C.'s promise. Therefore, if A. does not perform the act, C.'s offer is simply unaccepted. But if A. does the act he has fulfilled C.'s requirements, C. has obtained what he desired and is bound.

This decision is in line with the view that consideration is any act or forbearance or promise by one person given in exchange for the promise of another, *Harvard Law Review,* XII 516. In this article Professor Ames rejects the definition that detriment to the promise must be other than the fulfillment of a legal duty. If detriment be taken in the restricted sense of the definition, then there is no consideration in doing what one was already bound to another party to do, and the English cases are wrongly decided. But apart from the conflict of cases there is a practical reason why consideration should not be so restricted.

The broad doctrine of consideration is stated much more decisively in the Massachusetts case than in *Shadwell* v. *Shadwell,* but it amounts to the same in the end, and does not involve the rather indirect reasoning given in the English case. It may well be true that the consideration for the new promise lies in the fact that by doing the act the promisee has waived a right and has thereby suffered a detriment. This is the reasoning of the English judges. But aside from this circumlocution, why should the new promisor not be bound? Suppose A. *promises* C. that he will perform his pre-existing contract with B., A. then

has bound himself to two parties, both contracts are bi-lateral, and both B. and C. may sue A. on breach. But Sir William Anson says that it is unwarranted to assume that an action would lie by A. against C. on such a promise, for the reason that A. was already bound to do the act. That is true, but before he was bound to B. only, now he is bound to C. also, *to whom* he was *not* bound before, and the consideration for C.'s promise is A.'s promise to perform *to him.* This much is admitted by one American case, *Merrick* v. *Giddings,* which, however, limits it to cases where there is a promise given, and excludes cases where the act is done without a previous promise to do so. So much for additional bi-lateral contracts.

The same reasoning applies to cases similar to this Maryland one where the additional contract is uni-lateral, where C. promises to A. if he perform his existing contract with B., and A., *without promising,* does perform it. In the Maryland case, proceeding upon the second alternative state of facts, Newbold promises to pay Donnelly if Donnelly would perform his existing contract with Smith to deliver bricks. Donnelly made no promise to Newbold, but did deliver the bricks to Smith. By this act Newbold's offer is accepted and he is bound, providing, of course, that his offer was original, for if collateral he is not bound, as no notice was given. But original or collateral, there is consideration for his promise. Donnelly has done what Newbold offered to pay him for, Newbold has obtained what he desired, and the fact that Donnelly had previously contracted with Smith to do the same thing does not obviate the fact that Newbold has been given valuable consideration for his promise.

The weight of authority in American decisions is admittedly against this view. In *Robinson* v. *Jewett,* 116 N. Y. 40, 1889, it is said, "The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." This statement epitomizes American decisions on the subject. Yet, from a practical standpoint, there is no reason why the English rule is not the better one. The only ground on which the other rests is a mere technicality, the sole result of which is to restrict beyond all reasonable limits freedom of contract. If it is to the interests of business to enter into additional bi-lateral or uni-lateral contracts of this kind, it is not just that an arbitrary technicality should prevent it. If one desires to obtain a legal interest in an already-existing contract it is but reasonable that he be permitted to do so, in circumstances similar to the preceding cases.

B. L. S.